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## QUESTION PRESENTED

Did the court of appeals correctly affirm the rulings of the district court, which held that petitioners had violated respondent's rights under section 401(c) of the Labor-Management Reporting and Disclosure Act because his request to mail campaign literature to his fellow union members was reasonable and because petitioners' practice of refusing to honor requests such as respondent's was unreasonable?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1330

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,

*Petitioners,*

v.

TIMOTHY A. BROWN,

*Respondent.*

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

## BRIEF FOR RESPONDENT

## STATEMENT

### A. Facts.

Petitioner International Organization of Masters, Mates and Pilots ("IOMMP") is a national union, most of whose 8000 members work as ship's officers, as pilots, and in similar positions. Almost all members spend their working lives on board ship, and are often away from home for long periods of time. As a result, it is very difficult for members to communicate with each other about political issues facing the union without using the mails. Joint Appendix at 13 ("JA 13"). This is often true in unions, but, as courts have recognized in other cases, it is particularly true in maritime unions

because of the small number of workers on each vessel and the lengthy periods during which members are essentially incommunicado while at sea. And, as is true in most unions, the only complete membership mailing list is in the hands of the union. JA 80.

When this case arose in the summer of 1988, the union was about to conduct its quadrennial election of officers. Under the union procedure, which is set forth in Article V of the IOMMP Constitution, JA 25-40, nominations were to be made at the union convention from August 22 to 24, and the ballots were to be mailed out at some time between ten and thirty days after the convention ended. JA 38. Recognizing that the nature of its members' work prevents them from coming home to collect their mail for weeks or even months, the union allows a lengthy period of time — ninety days — between the mailing of the ballots and the deadline for their return. JA 14, 38. Regardless of when they actually see their ballots, most members return them shortly thereafter. JA 14, 50.

The procedure followed by the union for conducting mailings is set forth in an affidavit supplied by petitioner Robert Lowen, the president of the IOMMP. JA 60-61. A list of certified candidates is developed within the first ten days after the convention ends. At that time, an "Impartial Balloting Agency," which is selected at the convention, sends a notice to the candidates, telling them the procedures to follow in order to have their literature mailed. In the 1984 election, for example, this notice was dated August 15, JA 62, only twelve days before the ballots were mailed on August 27. JA 57. After that notice is received, the candidates may communicate with the mailing service, which prepares the literature for mailing and then sends it out. Union counsel refused to make any representation below about how far into the period between the convention and the ballot mailings candidates would actually be able to have their literature mailed, except to state, "I would anticipate that he could get his literature out in the mail *some period of time* before the ballots go out." JA 69 (emphasis added).

Respondent Timothy Brown was a candidate for the position of union president in the 1988 election. He wanted to send a mailing



to the membership in the month before the convention, rather than after the convention and just before the ballots were mailed out, because he wanted the membership to begin considering his candidacy, and the issues he hoped to raise in his campaign, before the deadline for making nominations. In addition, he hoped to attract support from other members who shared his dissatisfaction with the current course of the union, but who, in the absence of a known alternative, might be inclined to run for office themselves or commit themselves to support the candidacy of others. JA 14.

The officers of the union, however, were not anxious to facilitate Brown's opposition. They enjoy a monopoly over the official channels of communication within the union, primarily a union newspaper whose editorial board consists solely of the incumbent officers. IOMMP Constitution, Article XI, Section 5. By monopolizing this medium, the officers are able to generate a steady stream of articles promoting their own views concerning the problems facing the union, while refusing to print the articles of the intra-union opposition; in effect, this process permits the incumbents to set the agenda for all debates with the union. JA 13-14.

On May 9, 1988, respondent notified petitioner Elwood Kyser, the union's secretary-treasurer, that he wished to send a mailing to the union membership, at his own expense, in support of his candidacy, and he requested information on the costs involved. JA 15, 41. After waiting in vain for almost a month for a reply, respondent repeated his request to petitioner Lowen, specifying that he wanted to send out his mailing by July 5, 1988. JA 15, 42-43. On June 7, petitioner Kyser finally responded by denying respondent's request, on the ground that no mailings would be permitted until after the IOMMP convention had ended and an "impartial" agency had been selected to supervise the balloting itself. JA 15, 44-45.

On June 15, respondent promptly appealed this decision to the IOMMP General Executive Board ("GEB"), which is the highest governing authority in the union between conventions. In his appeal, respondent specified that he wanted to send out his mailing by July 5, and that he wanted a mailing service to be provided with

"Cheshire" labels, which are the kind of computerized mailing labels that can be affixed by machine. JA 15, 46. When no response was received to this appeal, respondent's counsel called petitioners' counsel to indicate that immediate legal action was contemplated in order to ensure that respondent's July 5 deadline was met. On June 27, 1988, petitioners' counsel responded that the matter was on the GEB's agenda for July 6, 1988, JA 47, and, on that date, the GEB denied respondent's request. JA 48.

After the preliminary injunction was entered in this case, petitioners conducted their election, in which respondent and petitioner Lowen were the only candidates for president. Having failed to prevent Brown's mailing, the incumbents ensured their election by stuffing the ballot box. Thus, although Lowen defeated Brown by 110 votes out of 4500 cast, the Secretary of Labor sued to overturn the election on several grounds, including extensive ballot fraud by petitioners. On August 31, 1990, the United States District Court for the District of Maryland found several violations of the law, including that the incumbents had refused to send ballots by mail to a large group of members as the union constitution requires, but instead had given them to a union employee, and that, as a consequence, numerous ballots were cast fraudulently by unidentified persons. The court found that, absent this ballot fraud and other violations, respondent would have won the election, and it ordered that a new election be held under the Secretary's supervision. That election will be completed at some time next year.[1]

**B. Proceedings Below.**

On July 11, 1988, respondent filed his complaint in the United States District Court for the District of Maryland, alleging a violation of section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 481(c), and petitioners' counsel received a set of papers the next day. On July 15,

[1]Copies of the official transcript of the district court's oral opinion have been lodged with the Clerk.



1988, Richard Hunsucker, head of the Division of Elections in the Department of Labor, which had been furnished with copies of respondent's requests and of petitioners' replies, wrote to both sides explaining that petitioners' position was contrary to the requirements of the LMRDA. Mr. Hunsucker warned that, if the union refused to honor respondent's request, it would be in violation of the Act, and that the Secretary of Labor would consider suing to overturn the election. JA 52-54.

A hearing was scheduled on respondent's motions for a temporary restraining order and preliminary injunction on July 25, 1988. At the hearing, petitioners urged the court to decide the case on the basis of the undisputed facts in the affidavits submitted by both sides, unless the record showed "factual conflicts" on which the union reserved the right to present evidence. JA 65. Respondent argued that his request to have his literature mailed to the union membership only eight weeks before the latest date when the ballots could be mailed, and only one month before the convention at which nominations would be made, was entirely reasonable. Petitioners did not argue that respondent's request was unreasonable, and indeed throughout this litigation they have never denied that it was reasonable for respondent to want to mail his campaign literature to the membership before the union's convention. Rather, their sole contention has been that the request should be denied because it is inconsistent with their rule concerning campaign mailings, a rule which they consider to be reasonable. Thus, petitioners argued that they should be permitted to require compliance with their past practice forbidding mailings until the candidates had been nominated and the list of nominees officially certified as eligible, although petitioners conceded in argument that respondent was, in fact, eligible to run for office. Somewhat incongruously, petitioners also argued that the Secretary, who had already threatened to overturn the election if Brown's request were denied, would sue to overturn it if the request were granted.

Respondent, for his part, argued that the union's practice was contrary to law, because the Secretary's regulations specify that

a candidate is entitled to have mailings done as soon as he declares his candidacy, whether or not nominations have yet occurred, and that, in any event, the focus under the statute should be on the reasonableness of respondent's request, not the reasonableness of petitioners' rules. Respondent further pointed out that this same construction of the statute had been adopted by the Secretary, and argued that the court should defer to the Secretary's judgment in that regard. Finally, respondent argued that the IOMMP Constitution did not in fact bar mailings before the convention, but rather did not speak to that issue, and that, even if no "impartial" agency had yet been selected for the 1988 election, such an outside agency was not necessary to generate the labels and send out the mailing.

District Judge J. Frederick Motz granted the preliminary injunction, relying on two alternate grounds. First, he accepted the view of the Secretary and ruled that, because the statute was framed in terms of "reasonable requests," the question was not whether petitioners had adopted reasonable rules, but whether respondent had made a reasonable request. Although acknowledging that unions may be encouraged to adopt rules, so that all candidates will know the procedures in advance, "in evaluating the validity of the rule a court must inquire not simply whether the rule may be said to be 'reasonable' but whether its application results in the rejection of a reasonable request made by a candidate." JA 77.[2] Because respondent's request was plainly reasonable, petitioners had violated the Act. *Id.*

In the alternative, Judge Motz held that the union's rule was unreasonable. First, he concluded that any rule that forbids all pre-

[2]In the court of appeals, petitioners carped at the district judge for referring to the delegates as representatives of their local unions, JA 77, suggesting that the "error" showed the need for a full trial. In fact, the delegates are representatives of the union's seven "membership groups" whose base is craft as well as geography. JA 18, 63. The district court had originally used the term "locals" in questioning petitioners' counsel, and counsel did not then object to the use of the term. JA 67. *See also Usery v. IOMMP*, 550 F.2d 826, 827 (2d Cir. 1977) (describing membership groups as "locals").



convention distributions is per se unreasonable, because a candidate has a valid interest in getting his literature into the hands of members and delegates to the convention in time to encourage discussion and consideration of his candidacy before the delegates assemble. JA 77. Second, although the union allows a lengthy time for members to return their ballots, Judge Motz noted that it was undisputed that members of the union work for long periods of time away from their homes. JA 78. Thus, even if a candidate could be confident that his literature would reach the homes of the voters, and be read by them, before they cast their ballots, candidates also have a right to give members the opportunity to receive their campaign messages in time to discuss the issues with each other before casting their ballots, which would be impossible if mailings were permitted only during the period of less than a month before the ballots are mailed. *Id.*

Judge Motz also found that the balance of hardships weighed in respondent's favor, JA 72, and accordingly the Court ordered petitioners to mail respondent's literature, at his own expense. This order was stayed pending a hearing before a panel of the United States Court of Appeals for the Fourth Circuit, and the case was argued before that panel on July 28, 1988 — three days after the preliminary injunction was granted. The panel affirmed the decision by a brief order, and explained its ruling a month later. The majority opinion, written by Judge Donald Russell and joined by Judge H. Emory Widener, agreed with the district court that the plain words of the statute, supported by the construction put on the statute by the Secretary, commanded unions to comply with any reasonable request and that reasonableness should be determined by reference to the statutory objective of ensuring free and democratic elections. JA 81-82. Moreover, the court observed, Congress recognized the fact of life that union incumbents have inherent advantages in elections, and section 401(c)'s right to have mailings done by the union was an effort to counteract that advantage. Specifically, given the incumbents' control of the membership list, their continuing contact with the union membership and lower-level officers, and their ability to use the union newspaper to communicate their own views

to the membership, an insurgent candidate obviously needs to be able to get his message out early and often in order to have a chance of success. JA 82-83. Thus, "the manifest result" of a rule that allows mailings only in the short period of time between nominations and balloting, "whether intended or not, . . . is to delay the insurgent candidate in beginning his campaign and to reduce the time within which he can make his appeal to the voters." JA 83.

The court then turned to petitioners' attempt to justify their rule as being a reasonable method to prevent discrimination in the use of mailing lists. It found this defense to be meritless, because any candidate could have made the same request as respondent and would have been equally entitled to have it granted. Rather, the granting of respondent's request would simply reduce the effective discrimination created by the incumbents' control of the channels of communication within the union. JA 84. Furthermore, the court held, the question was not the reasonableness of the union's rule; rather, the issue was the reasonableness of the member's request, JA 84, and petitioners had not denied that respondent's request was reasonable. JA 83.

A dissenting opinion was filed by Judge Kenneth K. Hall, who stated that the reasonableness of a particular request can only be ascertained by reference to the particular factual circumstances in which it was made, and that such a request necessarily threatens the union's ability to govern itself. JA 87. Moreover, Judge Hall deemed petitioners' rules to be proper, and he expressed the fear that, in the absence of "fair uniform rules" that all candidates had to follow, there might be "an appearance of disparate treatment." *Id.* Finally, Judge Hall acknowledged that courts should defer to the Secretary's construction of the statute, but he concluded that that rule was inapplicable here because the Secretary's position was "contrary to reasonable statutory interpretation" and "arguably in conflict with his own regulations," as Judge Hall construed them. JA 88 n.2.

The court of appeals then granted petitioners' request for rehearing *en banc*, and the Secretary entered the case to argue as *amicus*



*curiae* in support of respondent. Eight judges ultimately adopted the panel opinion as their own. JA 90. Judge James Dickson Phillips joined Judge Hall's dissent and added a brief statement agreeing that any request that does not comply with a union's "general rule" is unreasonable unless that rule is "unfair or arbitrary in its general application." *Id.*

## SUMMARY OF ARGUMENT

The language of the statute — unions must comply with "all reasonable requests" from "any candidate" — supports the lower courts' decision to focus on whether a particular request from a particular candidate is reasonable, rather than whether a union has adopted a rule that would defeat the request, and whether that rule is reasonable. Of particular significance is the fact that, in other parts of the statute, Congress expressly made rights subject to reasonable union rules. Indeed, the relevant statutory language is sufficiently clear that there is no need to resort to the legislative history and other interpretive aids to demonstrate that the construction of the statute advocated by the Secretary and endorsed by the lower courts is correct.

If the Court finds it necessary to consider more than the language of the statute, the legislative history establishes that Congress considered the right to do campaign mailings to be absolutely essential if an insurgent were to have a realistic chance of turning an incumbent out of office. Thus, a construction of the statute that facilitates campaign mailings is preferable to one that would have the courts defer to incumbent-sponsored rules, whose principal impact, if not the purpose of which, is to impede insurgent campaigning.

Nor is the question of focusing on the reasonableness of the request, rather than the reasonableness of the union's rule, an exercise in question-begging. It is true that, in the end, a court will have to decide the question of reasonableness, and in making that decision it will have to weigh the same combination of factors including the interests of the union as an institution and the interests of the

candidate, in light of the Congressional objective of union democracy. But there are two ways in which the difference between these two approaches is significant.

First, the way in which the question is stated goes a long way toward answering the question of on whose shoulders the court should place the burden of justifying the making or the denial of the request, and to whose judgment the courts should defer in deciding the question of reasonableness. If the issue is the reasonableness of the request, it is the candidate who is entitled to choose among alternatives, while the union must show that the candidate's position is unreasonable, and the courts will require the union to honor the request so long as the member has acted within the range of reasonableness. By contrast, if unions are entitled to adopt reasonable rules limiting the right to do campaign mailings, then in reviewing a dispute between the union and the candidate, the burden is likely to fall on the candidate to prove the union's rule unreasonable, and the courts will defer, to a greater or lesser degree, to the union's judgment about the balancing of interests.

Second, the number of "reasonable requests" that will be honored will be different under the two approaches. Thus, a rule is presumably reasonable so long as, in most instances, it would meet the legitimate interests of candidates without unduly harming the institutional interests of unions. The implication is that there is some range of permissible rules, some of which allow more mailings or make them easier, and some of which allow fewer mailings or make them more difficult to accomplish, and that the union's decision to impose limitations will be upheld so long as its rule falls within the range of reasonableness. The fact that there may be some small number of candidates whose legitimate interests would be ill served by the rule, or that a better rule could be devised without great difficulty, would not be a ground for insisting that the candidate's request be honored. On the other hand, if the law requires compliance with any reasonable request, a request that is contrary to a rule that would allow most reasonable requests would still have to be honored if the request itself were reasonable.



In effect, then, respondent's focus on the reasonableness of the request is likely to result in the allowance of more campaign mailings, and to better protect the interest of challengers in elections, while petitioners' focus on the reasonableness of the rule — assuming that most election rules tend to favor incumbents because of the manner in which they are written and applied — is likely to make it harder for insurgents to exercise this right. Moreover, if disputes arise, it will be far easier for the parties and the court to focus on the reasonableness of the request rather than the operation of an entire rule, especially in the context of preliminary injunction proceedings (which are the only way to resolve controversies that arise in the course of an ongoing election), because the litigation can focus on the single request rather than on the possible inequities of the union's entire system.

Moreover, incumbents have no incentive to adopt rules that facilitate challenges to their positions or to allow mailings unless the requests are clearly reasonable. An insurgent candidate, however, has every incentive to limit mailings to those which are truly needed for a successful candidacy, because the candidate has to pay the expenses of the mailing, and few insurgents find themselves with a surplus of campaign funds. In short, no legitimate union interest requires adoption of the "reasonable rules" approach, but the strong interest in ensuring that union officers are held accountable to their constituents strongly counsels in favor of making the right to do a mailing turn on whether the request is reasonable, not on whether the union rule barring the mailing is reasonable. This does not mean that a court could be justified in ignoring a union rule, and the lower courts did not do so; it only means that the existence of a union rule does not end the case.

Even if the Court concludes that a request is valid only if it complies with a reasonable union rule, the judgment should be affirmed because respondent's request did not violate any reasonable union rule. Not only does the IOMMP Constitution not contain the rule that petitioners now assert as a justification for denying his request, but such a rule is plainly unreasonable because it unduly limits the

right of an insurgent candidate to campaign for union office to the few days before the vote is held. Nor have petitioners advanced any legitimate union interest that justifies the severe impact that the rule that has on the interests of a candidate who challenges an incumbent union officer.

## ARGUMENT

### A. Introduction and Statutory Background.

Because this case presents an issue of statutory construction, we begin with the words of the statute. Section 401(c) of the LMRDA provides that unions and their officers

> shall be under a duty, enforceable at the suit of any bona fide candidate . . . to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization . . ..

This language was added to the LMRDA on the floor of the Senate, supported by both organized labor and those who were pressing for rigorous standards of union democracy. They all agreed that this is one of the minimum standards with which all unions would have to comply in order to promote union democracy. II NLRB, *Legislative History of the LMRDA* 1240-1242 (1959) (*"Legis. Hist."*). The bill also forbids discrimination in the use of lists, but the affirmative duty was deliberately added in an effort to achieve maximum support on the floor. *Id.* at 1240.

As Senator McClellan explained, an incumbent officer, by the very nature of his position and the daily work he does for the union, can perpetuate himself in office because he

> would know how to line up his forces, and so forth; but a candidate who was not in office would not have a [complete membership] list and would not have all that information. This amendment would simply permit him to send



> his campaign material to the union and have the union mail it out.

*Id.* at 1240.

Organized labor had expressed concern that, if the mailing list were given to the candidates themselves, it might get into the wrong hands, and the solution was to give unions the affirmative duty to do mailings for the candidates. According to the sponsors of the substitute amendment, this right would be available to any "serious" candidate or any "legitimate" candidate for union office. *Id.* at 1240, 1241.

One concern that was expressed during the debates was that unions might not comply with the requests, and that courts might not have time to deal with the litigation before the election had taken place, thus permitting the incumbent officers to protect their positions and then to spend the union's money to defend their actions. *Id.* at 1241. Indeed, one proposal was to impose criminal sanctions to ensure compliance. Senator Javits, however, who played a key role in forging the compromises in the union democracy provisions generally and who wrote the language for section 401(c), reassured his colleagues that he believed that "a court will act, and act in time." *Id.*

This legislative history makes it clear that, at the very least, section 401(c) was intended to aid insurgents in their efforts to challenge incumbents, and it should thus be construed to advance that objective. But in addition to the specific legislative history concerning section 401(c), the Court's interpretation of the LMRDA should be informed by a general understanding of conditions in the labor movement, of which Congress was acutely aware. Thus, commentators on problems of union government uniformly recognize that incumbents, by repeatedly communicating their own views of the problems facing the union and their proposals for solving such problems to the union membership, have the opportunity to set the agenda for discussion of union affairs in a way that favors their own programs and their own reelection. Hartley, *The Framework of*

*Democracy in Union Government*, 32 Cath. L. Rev. 13, 78-79 (1982); Jacobs & Spring, *Fair Coverage in Internal Union Periodicals*, 4 Indus. Rel. L.J. 204, 206-215 (1981). Insurgent candidates need the opportunity to communicate with each voter on more than one occasion if they are to have any hope of overcoming incumbents' advantages in this regard. *See generally* Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 Md. L. Rev. 93 (1984) (''*One-Party State*''). Professor Summers points out in *One-Party State* that, in order to achieve Congress' objective of fostering democratic control of unions, the courts must not be blind to the political realities in which union democracy must function. *Id.* at 118. Thus, he suggests,

> the law cannot be paralyzed by nominal neutrality between the incumbents in control and the opponents who challenge their control. The function of the law must be to loosen the grip of oligarchy so that those opposed to the incumbents can make their voices heard and the weight of their opposition felt.
>
> *Id.* at 99.[3]

In their brief, petitioners criticize the reliance of the court below on such considerations in construing section 401(c). According to petitioners, Petitioners' Brief (''Pet. Br.'') 26 and n.9, the Fourth Circuit improperly assumed, without any factual support, that petitioners had abused their control of the union channels of communication between elections. This criticism is erroneous, because incumbents' control of the channels of communication is not a ''factual'' matter that can or should be subject to proofs at a trial every time a section 401(c) motion for preliminary injunction has to be litigated. Rather, as the legislative history shows, these are the

[3]Professor Summers was a member of the special committee formed by Senator John F. Kennedy, the Chairman of the Senate Labor Committee, and chaired by Archibald Cox, that advised the Senate Committee in drafting the legislation. He was the author of a ''Bill of Rights for Union Members'' that became the basis for Senator McClellan's floor amendments. His pioneering scholarship was cited in the debates on the floor. *E.g.*, II *Legis. Hist.* 1113.



very conditions in the labor movement that animated Congress' decision to create an absolute right to do membership mailings without a showing of discrimination.[4]

Both petitioners and their *amicus* place great reliance on a fragment from the Court's decision in *Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1982), which in turn cited reports of the Senate Labor Committee, to the effect that the proposed legislation was intended to minimize intrusion into union self-government. Pet. Br. 15-16, AFL-CIO Br. 17-18. They invoke that language in support of their contention that the statute should be construed to leave in place any union rules that are not explicitly invalidated by Title IV.

It is true that such language appeared in the Senate Committee reports in both 1958 and 1959, but what the unions ignore is the reason why the language was placed in the reports — to explain why the committee had decided not to include a Union Members' Bill of Rights and other specific union democracy protections in the bill, and to rely instead on a policy of encouraging unions to adopt Ethical Practices Codes and police them internally. *See* Levy, *Legal Responses to Rank and File Dissent*, 30 Buff. L. Rev. 663, 684 n.118 (1981); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 857 (1960); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich.

[4]In any event, undisputed facts in the record show that the matters about which Congress was concerned when it enacted section 401(c) were present here. Respondent's undisputed affidavit establishes that the union's newspaper is ''the principal and only regular source of information members have about union affairs,'' that the editors of the newspaper are the incumbent officers of the union, that the editors screen out membership submissions that are ''political,'' that the editors use the newspaper to promote their own views of the union's problems, and that consequently ''members are subject to [a] steady barrage of information favoring the policies espoused by the incumbents.'' JA 13-14. Because petitioners asked to be allowed to submit evidence only to resolve conflicts in the record, JA 65, and never asked to be allowed to present evidence on this issue, they can scarcely take the courts below to task for not deciding, *sua sponte*, to hold a trial on this issue.

L. Rev. 819, 831 (1960). The House Committee's report, by contrast, which was written after Title I and section 401(c) had been inserted on the Senate floor, and which accompanied a bill containing similar provisions, does not include comparable language solicitous of minimizing intervention. I *Legis. Hist.* 759-833. The addition of Title I and of section 401(c) of the Act on the Senate floor amount to a repudiation of the philosophy expressed by the cited language in the Senate Committee's reports, *see* Cox, *Internal Affairs*, *supra*, 58 Mich. L. Rev. at 845 (1960) (as enacted, the provisions of Title IV "descend too far into detail, impairing the ideal of self-government"), and therefore it cannot be used as a guide to interpreting those portions of the statute, such as section 401(c), that were added after the committee reports were written.

Moreover, we urge the Court not to lend credence to the notion that the minimum protections for union democracy that Congress decided to include in the statute should be given the most crabbed possible interpretation in order "to promote union self-government interests." AFL-CIO Br. 18. To the contrary, the idea of empowering members to mount realistic challenges to entrenched union leaders "so that they may . . . bring about a regeneration of union leadership" lay at the heart of Congress' strategy for returning unions to *genuine* self-governance and stamping out corruption by ensuring that leaders would be accountable to their constituents. *E.g.*, II *Legis. Hist.* 1099 (Sen. McClellan); I *Legis. Hist.* 767; Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 Duke L.J. 903, 935 (1990). Emphasis on the non-intervention philosophy overlooks the fact that Congress was "committed to making that intervention, once warranted, effective in carrying out the basic aim of Title IV." *Wirtz v. Glass Bottle Blowers Local 153*, 389 U.S. 463, 473 (1968).

In the lower courts, petitioners never argued that respondent's request to have his literature mailed was unreasonable. Instead, relying on a pair of cases from the Third and Ninth Circuits,[5]

[5] *Donovan v. Philadelphia Metropolitan Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986); *Marshall v. Meat Cutters Local 274*, 623 F.2d 1322 (9th Cir. 1980).



they argued that respondent was required to comply with the union's past practice with respect to mailing of campaign literature because the practice was itself reasonable. Accordingly, any request that did not comply with the union's procedure would be *per se* unreasonable.

In the following pages, we argue first that petitioners have chosen the wrong focus for their argument, and that the Secretary of Labor and the courts below are correct in focusing their attention on whether respondent's request was reasonable. We also explain why the difference between "reasonable rule" and "reasonable request" is not mere semantics. Second, we argue that the preliminary injunction was properly affirmed even if the focus is whether the union had a reasonable rule.

## B. The Focus of Section 401(c) Is on the Reasonableness of the Request, Not on the Rule on Which the Incumbent Officers Relied in Rejecting It.

### 1. The Language and Purposes of Section 401(c) Support a Focus on the Reasonableness of the Member's Request, Which Permits the Individual Candidate the Opportunity to Do Campaign Mailings at Any Point Within the Range of Reasonableness.

There is no question that the Secretary has construed the statutory language — "reasonable requests" — to provide that the relevant determination should be made by focusing on whether the request itself is a reasonable one, not on whether the member has complied with a union rule that can be defended as "reasonable." Although we agree with the Secretary that she is entitled to deference in this interpretation under *Chevron USA v. NRDC*, 467 U.S. 837 (1984), we do not discuss that doctrine further here, in part because the Secretary's brief discusses it at some length, and in part because, in light of the language and purposes of section 401(c), we think that the Secretary might well exceed her discretion if she were to construe the statute as petitioners do.

The reasons in support of this interpretation appear on the face of the statute. First, section 401(c)'s own language plainly requires unions to comply with "reasonable requests," and does not require union members to comply with "reasonable rules" in making their mailing requests. Second, the language of section 401(c) contrasts sharply with language in several other sections of the LMRDA, such as sections 101(a)(1) and 101(a)(2), which provide that speech and voting rights are subject to "reasonable rules" in the union's constitution. In addition, section 401(e) makes the right of every member in good standing to run for office subject to "reasonable qualifications," which is the functional equivalent of allowing reasonable rules. Evidently, Congress knew how to write a statute in such a way when it wanted a member's rights to turn on compliance with reasonable rules, but it chose not to do so in the case of campaign mailings.

The unions seek to avoid the force of this argument by invoking the well-known warning of Archibald Cox that courts should look to Congress' objectives and avoid "placing too great emphasis on close construction of words." *E.g.*, Pet. Br. 13 n.2. But when the rival objectives in question are so vague as "union self-government" and "union democracy," this formulation is an open invitation for the courts to simply make up statutory standards as they go along, ignoring the most reliable guide to Congress' intent — the words used by Congress. *See, e.g., Chan v. Korean Air Lines*, 109 S. Ct. 1676, 1683-1684 (1989). Surely, a court could not simply ignore the plain language when the contrast is so clear as between section 401(c) and the other LMRDA provisions cited above.

Nor is the difference between "reasonable requests" and "reasonable rules" merely a semantic one. The real impact of the distinction between "reasonable rules" and "reasonable requests" is to determine whose judgment about what is reasonable receives deference — the union, whose judgments are made by the incumbents, who naturally will seek to minimize the opportunity of their potential opponents to campaign, or the insurgents, who will seek to maximize their opportunity to campaign consistent with their



ability to pay for mailings? If a court asks whether a union's rule is "reasonable," it will give a measure of deference to the union's judgment about what time periods and other conditions are appropriate. The Secretary's "reasonable request" approach, by contrast, gives deference to the judgment of the candidate who seeks to use the union's mailing about when and how often he wishes to pay for this particular form of campaign promotion. If the union objects to the mailing at that point in time, the validity of the union's objection is determined *de novo*, subject to appropriate deference to the Secretary's expertise, but the request will be enforced so long as the candidate's choice is within the range of reasonableness.

Put another way, in the particular circumstances of any union, there will presumably be a range of requests that will be reasonable, as well as a range of possible union rules that will be reasonable. Some union rules might be reasonable because, in most circumstances, they afford sufficient opportunity to campaign, even though some candidates might have special needs, peculiar to their own circumstances, that would make their requests for the opportunity to campaign reasonable even though, in most circumstances, such requests could reasonably be denied. Under the "reasonable rule" approach, the fact that most candidates would be given an adequate opportunity to campaign would be enough to warrant upholding the rule and denying an otherwise reasonable request.

There are a number of reasons related to the purposes of the statute that counsel adoption of the Secretary's approach. First, if every requester who wishes to make a mailing that is apparently forbidden by a union's rules or past practices has to show that the union follows an unreasonable rule, that requester must presumably mount proofs concerning the entire range of requests that are permitted or forbidden by the union's rule, showing that the number of reasonable requests that are outlawed by the union's rule is more than minimal. In effect, every such case becomes a challenge to the union's entire system. However, these cases typically arise in a preliminary injunction posture, with the balloting looming and with very little time available for judicial determination. If, as hap-

pened here, the union tries to avoid service, JA 48-49, 55-56, the time for a hearing is even further reduced. A construction of the statute that turns every case into a challenge to the union's electoral process as a whole would make it difficult, if not impossible, for the courts to live up to Senator Javits' assurance that "the courts will act, and act in time." II *Legis. Hist.* at 1241.

Moreover, an interpretation of section 401(c) requiring deference to union rules on campaign mailings will have the effect of assisting union incumbents in staving off challenges to their control of the union. The fine words in petitioners' brief about the desirability of allowing union members to govern their own elections, Pet. Br. 15, *see also* AFL-CIO Br. 12, completely ignores that it is the incumbents who write and construe the rules, and they obviously do so in their own interests. If, as Professor Summers and virtually all commentators note, most unions are one-party states, a construction of the statute that requires deference to the union's rules would be tantamount to deferring to the judgment of Communist Party officials in making and construing rules about when and where opposition parties may campaign in the democratic elections now sweeping through Eastern Europe. It is, indeed, a standard tactic, when a totalitarian country decides to go through the motions of holding a plebiscite, to bar campaigning until a week or so before the balloting, which is the effect of the union rule at issue here. The Court has repeatedly stated that it is appropriate to construe labor statutes in light of the "realities of labor relations and litigation," *DelCostello v. Teamsters*, 462 U.S. 151, 167, 172 (1983), and it is surely appropriate to construe the LMRDA in light of the practical reality that most unions operate as one-party states.

Construction of the statute in a way that denies any deference to union judgments is particularly appropriate with respect to campaign mailings because of the absence of any significant union interest in limiting the right to campaign. After all, Congress avoided imposing on the union's legitimate interests both by crafting the compromise whereby union lists would remain confidential in return for having the union be responsible for doing the mailings, and by



providing that the member must bear all of the costs of preparing and mailing the literature.

Indeed, a consideration of the financial incentives concerning campaign mailings that affect both incumbents and insurgents shows why it is more appropriate to allow insurgents to act within the full range of reasonableness than to give a comparable freedom of action to incumbents. Incumbents, who by virtue of their positions are in daily contact with the membership and control the regular channels of communication within the union, such as the union newspaper, have no incentive to err on the side of making mailings any more available than section 401(c) absolutely requires. Moreover, if the question of reasonableness is a close one that may have to be litigated, they know that they can direct union counsel to defend, at union expense, whatever position they may adopt concerning a particular mailing.

Insurgent candidates, on the other hand, have every incentive to limit mailings to those that are truly needed for a successful candidacy, because of the portion of section 401(c) requiring candidates to pay the expenses of the mailing. Indeed, a candidate who knows that the question of reasonableness is a close one and thinks that the union may resist making the mailing, must find counsel and pay at least the costs of the litigation, if not a substantial retainer for the litigation of the case. Most union candidates have a discrete amount of money that they can raise for their campaigns, and it would be most surprising if candidates were to spend money on mailings at a time when it would do them no good, or with a frequency that would numb the member-recipients and lead them to ignore future campaign mailings from those candidates. For these reasons, in cases in which the reasonableness of the request is a close question, insurgent candidates will be more likely to lean in the direction of not doing the mailing.[6]

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[6]The part of the financial disincentive for insisting on a mailing, that is created by the need to pay for litigation, may be reduced, but not eliminated, by the availability of an attorney fee award under the common benefit doctrine. *Hall v. Cole*, 412 U.S. 1 (1973) (free speech under Title

*(footnote continued)*

Some union rules do not raise comparable concerns of favoring incumbents over insurgents because they do not effectively impose any substantive limits on the opposition's right to campaign; rather, they simply set forth a neutral procedure by which mailings are to be done. For example, the statute makes clear that members may be required to bear the expense of mailings, and a union might insist that payment be made in a particular form (such as money order or certified check). Similarly, the statute requires the member to make a request, and a union could presumably insist on a particular form of delivery of the request (such as certified rather than first-class mail), in order to ensure an adequate record of the request and its receipt. Or, where the union's list is not maintained in computerized form, and it actually requires substantial labor to produce a complete set of labels or to affix addresses to envelopes, a union might reasonably require sufficient advance notice to be able to complete a timely mailing.

Rules of this kind do not impose any substantial limits on the right to do campaign mailings. Indeed, in order for the union to implement the statutory command to do mailings, it must have some sort of procedure for doing them, and Congress' objectives of fostering real competition for offices within unions are in no way offended if courts give some deference to a union's judgments about the sort of "housekeeping" procedures that need to be followed in order to comply with actual administrative constraints. But where the union's rule actually limits the statutory right by imposing a procedural obstacle that cannot be avoided simply by filling out the right form on the right date — such as a rule limiting the number of mailings or limiting the time when mailings may be done — the union's

I of the LMRDA); *Mims v. Teamsters Local 728*, 821 F.2d 1568 (11th Cir. 1987) (applied to section 401(c) case). However, even in that event, few lawyers are willing to take such cases on a purely contingent basis, without a retainer for costs and some fees, and so, at the very least, the candidate will have to pay for the litigation during the course of the campaign and hope for reimbursement later. However, even if the candidate can be reimbursed in that fashion, the need to prosecute a case under section 401(c) deprives the candidate of cash that is needed for use during the campaign.



judgment should receive no deference, and the sole question should be, as the lower courts held, whether the candidate's request is reasonable.

Petitioners take the lower courts to task for portraying union elections as a Manichaean contest between insurgents and incumbents, overemphasizing "the supposed advantages of incumbency," and ignoring the fact that some elections are contested between non-incumbents. Pet. Br. 19. But the courts below did no more than follow Congress' judgment in enacting section 401(c), because, as the legislative debates cited above show, this provision was inserted precisely because Congress recognized the advantages of incumbency and desired to neutralize them. Specifically, Congress recognized that incumbents do not ordinarily need access to the mailing list because they enjoy contact with the membership year-round, while non-incumbents do need such access. Indeed, even in construing other portions of the statute, this Court has not hesitated to take into account the ways in which union rules can operate to perpetuate a one-party structure and to prevent electoral challenges by any member not favored by the incumbents. *Wirtz v. Hotel Employees Local 6*, 391 U.S. 492 (1968). Thus, a construction of section 401(c) that is built on recognition of the functional advantages of incumbency, and that is intended to make it easier for nonincumbents to do mailings and make it harder for incumbents to handicap or deny the right to do mailings, is in harmony with Congress' intent in passing section 401(c).

It is true that, sometimes, incumbents retire, and the contest is between two non-incumbents.[7] However, even in such instances,

[7]We use the word "sometimes" advisedly in referring to incumbents who retire by not running for reelection. The far more common route of succession is for the incumbent to retire (or die) during his term of office, allowing the executive board to pick a successor without an election. *See, e.g.*, Quaglieri, *The New People of Power: The Backgrounds and Careers of Top Labor Leaders*, 9 J. Lab. Research 272, 279-280 (1988); Lipset, Trow & Coleman, *Union Democracy* 148 (1956). *See also* 29 C.F.R. § 452.25 (no election required to fill vacancy). The appointed successor then runs as an incumbent in the next election.

the one-party nature of most union polities means that the contest is usually between a candidate supported by the official family (such as the union's second-ranking officer) and someone who recognizes that the absence of an incumbent provides the best possible opportunity for an outsider to break the cycle of incumbent re-election. Even if the official family's candidate lacks the personal name-recognition and other advantages that are enjoyed by the long-time principal officer of a union, he still enjoys the advantages of patronage and other aid that the official family can offer. *See* James, *Union Democracy and the LMRDA*, 13 Harv. C.R.-C.L. L. Rev. 247, 270-283 (1978), for an account of many of these advantages. In any event, the possibility that some elections may be contested without one side enjoying the advantages of incumbency does not mean that section 401(c) should not be construed in a way that fits the practical politics of the great majority of intra-union contests.

Petitioners suggest, however, that the "reasonable request" approach requires the courts to make reasonableness determinations in a vacuum, without any reference to the facts of the particular case, and that only the "reasonable rule" approach gives the court a context within which to determine the reasonableness of the union's decision to deny the request. But it is not the existence of the union rule that gives a court the context — it is, rather, the factual circumstances facing the union and the candidates that will determine the reasonableness either of the union's rules or of the candidate's request.

The circumstances of this case show why the "reasonable rule" approach gives the courts no greater "factual context" than the "reasonable request" approach. The union "rule" provides that mailings may only be done after the convention, and that is said to be justified on the ground that no "balloting committee" or "balloting agency" is selected until then. That the union does not pick those bodies until after the convention is a fact that courts can consider, and here did consider, in deciding either the reasonableness of the request or the reasonableness of a rule that bars mailings before these bodies have been chosen. The court below came to



the conclusion that, whatever petitioners' intent, the effect of the rule against pre-convention mailings was to place undue limits on the ability of an insurgent candidate to get his message out to the voters, when the incumbents have had a full four years of control of the union press and other levers of power to make themselves familiar to the voters. JA 83-84. Indeed, as we argue below, at 33-34, the effect of the rule is to bar any campaign mailings until the few days before the ballots themselves are mailed. But it is hard to see how the mere fact that the union chooses not to gear itself up to deal with election mailings until after the convention contributes much of anything to the analysis of whether it is reasonable for the union to take that position.[8]

In summary, then, there is no reason to give union leaders the extra assistance in perpetuating themselves in office that a rule of deference would do, and every reason for the courts to leave it to a candidate, subject only to a rule of reasonableness, to decide when a campaign mailing should be done.

### 2. Deference to Union Judgments About What Restrictions on Campaign Mailings Are Reasonable Is Not Needed to Avoid Discrimination or to Encourage Unions to Limit the Discretion of the Incumbent Leaders.

Petitioners' principal argument in defense of the "reasonable rule" approach is that the "reasonable request" approach is contrary to a sentence in the Secretary's regulations that encourages unions to adopt rules governing campaign mailings so that candidates will know in advance what procedures they have to follow, and will not claim that they have been subjected to discrimination. 29 C.F.R.

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[8]Petitioners' Question Presented errs in asserting that the decision below "precludes consideration of the union's rule regulating distribution of campaign literature." The court of appeals considered the rule; it simply refused to give decisive weight to a determination of whether the rule was reasonable.

§ 452.67.[9] This approach, the court concluded in *Donovan v. Philadelphia Metropolitan Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986), and the union argues here, comports with the important statutory policy of preventing discrimination. The argument is, however, seriously flawed because the Secretary's regulation can be construed in a way that advances the goals of non-discrimination and union democracy without conflicting with her adoption of the reasonable request approach. Moreover, as the facts of this case demonstrate, deference to union rules would encourage incumbents to discriminate against insurgent mailings, and when a union rule is disregarded because it would have barred a reasonable request, no post-election charge of discrimination is either likely or meritorious.

First, we agree, the lower courts agreed, and the Secretary agrees, with the concern expressed by *Carpenters* about avoiding discrimination. But that does not mean that a union can avoid its obligation to comply with "all reasonable requests" simply by adopting a rule that is facially non-discriminatory, regardless of its content; rather, such a rule is lawful only if it requires the union to comply with all reasonable requests. And, in deciding whether the rule meets that standard, there is no requirement that either the Secretary or the courts give any deference to the union's views about what is reasonable.[10]

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[9] "The Act imposes the duty on the union and its officers to comply with all reasonable requests of any candidate to distribute his campaign literature at his expense. When the organization or its officers authorize distribution of campaign literature on behalf of any candidate, similar distribution under the same conditions must be made for any other candidate, if he requests it. In order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in those conditions."

[10] As we suggested *supra*, at 22-23, it may be appropriate to give some deference when a union applies neutral procedural rules, such as those governing requests' format, manner of delivery, or manner of payment, that notify members of what they need to do to accommodate genuine administrative constraints, but do not limit the requests that may be made.



Moreover, the union's argument focuses unduly on the anti-discrimination portion of the statute, to the detriment of the union's affirmative obligation to comply with "all reasonable requests." Congress decided to include *both* a rule against discrimination *and* a rule requiring compliance with all reasonable requests, and there is no basis for giving the former rule primacy over the latter. The Secretary's regulation simply points out that unions have both obligations, and suggests a way for unions to protect themselves by giving notice of what they intend to do in light of both obligations and of any technical or administrative limitations to which they may be subject. The regulation does not purport to override the affirmative obligations in the statute, nor, in our view, could the Secretary do so even if she tried.

Nor, as the court below recognized, JA 84, would the union have been open to a charge of discrimination had it simply allowed respondent to do the mailing. First, there would be no discrimination unless some other candidate for the same union office made a request to do a mailing during the summer before the convention and had the request denied; however, so far as the record reflects, there were no other requests for this right by any other candidate for union office. Indeed, the union conceded at oral argument in the district court that there were only two candidates for President in the previous election, in 1984, and the only candidates for President in 1988 were respondent and the incumbent, petitioner Lowen. Because there were no other persons similarly situated to respondent, petitioners could not have discriminated against anybody by granting respondent's request.

Petitioners' concern that some other candidate might not learn about the availability of a pre-convention mailing is an effort to bootstrap a past violation of the statute into a permanent one. The union could always communicate the availability of such mailings to all announced candidates or to the full membership, in its newspaper or otherwise. Certainly petitioner Lowen, the incumbent against whom respondent was running, was aware of that opportunity and could not claim discrimination. Indeed, if petitioners had promptly

granted respondent's request when he first made it on May 9, 1988, they could easily have communicated with any other candidates in time for all of them who wanted to do a mailing before this suit was filed in mid-July. Moreover, as petitioners conceded below, JA 66, the union mailed out a special issue of its newspaper, containing a notice of the opportunity to make nominations, the week after this action was filed.

Petitioners could easily have taken advantage of that opportunity to notify the membership of a change in mailing procedures, as well as of the upcoming nominations, but they chose not to do so. In those circumstances, petitioners' breast-beating about possible discrimination against unknown candidates, based on lack of notice of the opportunity to match respondent's request, would simply convert the existence of a union rule, regardless of whether or not it is reasonable, into a foolproof barrier against having to do mailings for insurgents any earlier than the incumbents want to allow them. The courts below properly refused to permit the incumbents to take advantage of their own laggardly response to the request and their stubborn refusal to acknowledge their statutory obligations, as a basis for claiming that respondent's statutory rights should be denied because there was no longer sufficient time to notify other potential candidates.

In this regard, it is worthy of note that 29 C.F.R. § 452.67 does not call for the establishment of union "rules" which must be followed without variation during the course of the election and which are to be given deference by the Secretary or the courts. To the contrary, the regulation simply calls for advance notice *and for prompt notice of any changes in those conditions*. It is thus hard to understand how this regulation can be construed as endorsing the "reasonable rule" focus on which petitioners insist.

Petitioners and their *amicus* make much of the desirability of union rules concerning mailings as a means to limit the discretion of union officials and thus prevent discrimination against disfavored candidates. The "reasonable request" approach, it is said, discourages unions from making rules that limit official discretion because it would



deny any preclusive effect to those rules. AFL-CIO Br. 20; Pet. Br. 15. There are, however, two flaws in this reasoning.

First, the reasonable request approach does not preclude the issuance of rules; it simply denies deference to a union rule insofar as the rule forbids mailings in response to reasonable requests. *See* LMRDA Section 401(e) (union constitution and bylaws must be followed only "insofar as they are not inconsistent with the provisions of" Title IV). A union may choose to have a rule in order to provide a form of notice to the membership of what sort of mailings will be permitted, and so long as the rule requires the union, at a minimum, to honor all reasonable requests, the union can be sure that following the rule will protect it against a finding that it violated rights under Title IV. Such a rule would confine official discretion in those circumstances in which the request would not be deemed "reasonable" by the courts and in which the union, absent the rule, would be permitted to deny the mailing request. A union that chooses to allow members to do more than the law requires would be protected; it is only the rule that does *not* require compliance with all requests that the courts would judge reasonable that would not be honored. The only "discretion" that the reasonable request approach denies to union officials is the discretion to deny reasonable requests, and the union can scarcely complain that its incumbents need such discretion.

The second flaw in the argument that a "reasonable rule" approach is needed to encourage unions to adopt rules confining incumbent discretion is that, however appealing it may be as an abstract matter, it ignores who writes the rules and who decides how to apply them. Because most unions operate as one-party states, and because almost every national union writes its constitution at conventions which, as a rule, are controlled by the incumbents, *see* Hartley, *The Framework of Democracy in Union Government*, 32 Cath. L. Rev. 13, 70-75 (1982); James, *Union Democracy and the LMRDA*, 13 Harv. C.R.-C.L. L. Rev. 247, 261-262 (1978), rules governing campaign mailings represent the incumbents' effort to protect themselves against electoral challenges as best they can. Even when a union constitution is approved in

a referendum, as the IOMMP Constitution was, the leadership drafts the constitution and the members, here and in most cases, can only vote the entire document up or down. Even in the best of circumstances, then, constitutional provisions rarely represent the considered view of the membership about the best way to "diminish th[e] officers' discretion," AFL-CIO Br. 20, to ensure that electoral challenges will be possible. Moreover, few unions have independent judicial bodies to decide how rules should be applied; rather, appeals are decided by the executive officers, and when survival in office is at stake, decisions about construction and application of the rules are inevitably political, rather than confining the incumbents' discretion. Hartley, *supra*, 32 Cath. L. Rev. at 67-68.

For all these reasons, the court of appeals properly refused to make this case stand or fall on a determination of whether the union's rule was reasonable. Instead, the lower court properly took cognizance of the union rule in question, discussed its effects on union democracy, and correctly held that respondent's request was reasonable and should have been granted.

### C. Even if A Request May Be Denied Based on a Reasonable Rule, There Was No Rule Here and the Union's Practice Was Not Reasonable.

Even if the Court disagrees with the Secretary's construction of the statute and decides that the focus of section 401(c) is on whether the union has a reasonable rule, the judgment below should be affirmed. That is so because here there was no "rule" against pre-convention mailings, and, even if the union's constitution is properly construed to include such a rule, that rule is unreasonable.

First, the IOMMP Constitution does not contain any prohibition on pre-convention campaign mailings. Petitioners have assumed throughout this case that their constitution so provides, but they have never pointed to any language so stating. Instead, they have relied on Article V, Section 10(a), which requires an "Impartial" Balloting Agency ("IBA") to make arrangements to protect the



security of the list, to pick a mailing service, and to notify candidates of the name of the service and the costs involved. JA 39-40. Because the IBA operates under the supervision of an International Balloting Committee ("IBC"), JA 36, and because both the IBA and the IBC are selected by the delegates at a convention, JA 26, 36, petitioners argue that mailings cannot possibly be done before these bodies have been selected.

The fact remains, however, that petitioners are reading a prohibition by implication into a constitution whose text contains no such language. The far better construction of the IOMMP Constitution is that, although mailings done after these bodies are selected are to be conducted under the aegis of the IBA and IBC, mailings done before that time are to be supervised by the incumbent union officials, which is how petitioners complied with the preliminary injunction that was entered in this case. Moreover, there were an IBC and an IBA selected at the previous convention (in 1984), and if the IOMMP's officers are too busy to supervise campaign mailings, Pet. Br. 24, then they could have used the IBC and IBA from the previous election to handle the matter.

In support of its construction of the IOMMP Constitution, petitioners will no doubt invoke the hoary rule that courts should generally defer to any reasonable construction that is placed on a union constitution by an official union body that is authorized by the constitution to promulgate official interpretations. *English v. Cunningham*, 282 F.2d 848, 850 (D.C. Cir. 1960). There are several reasons, however, why this general rule does not aid petitioners here. First, constitutional provisions that are invoked to limit Title IV rights must be construed narrowly, *Hodgson v. ILA Local 1418*, 76 LRRM 2556, 2557 (E.D. La. 1971); *see also Donovan v. Laborers Local 427*, 113 LRRM 3444, 3446 (N. D. Iowa 1983) (requiring "sound explanation" for application of a candidate eligibility rule to remove any candidate from ballot); *cf. Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (contract may be used to overcome statutory rights only if waiver is "explicitly stated" and "clear and unmistakable"), and so should be given that effect

only if the limitation appears on the face of the provision. Second, just as statutes should generally be construed to avoid questions of their consistency with a state or federal constitution, so union constitutions are generally construed to avoid a possible conflict with laws or public policies supporting union democracy. Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L. J. 176, 181-184 (1960); Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1229, 1233-1236 (1961), *citing, e.g., Irwin v. Possehl*, 143 Misc. 855, 257 N.Y.S. 597, 601 (Sup. Ct. 1932) ("the constitution and laws of every labor organization are to be judged and construed in this state and country according to well conceived ideals and principles of law ordained by a democratic people . . ..."). For these reasons, this canon of union constitutional construction does not apply to support the application of the constitutional provisions of the IOMMP constitution in a manner that would deny respondent's request to do a pre-convention mailing.

Finally, the record does not reflect that petitioners have rendered an official constitutional interpretation of the IOMMP Constitution. We may assume that no candidate has previously requested the right to do pre-convention mailings, although the record is silent on the point. Nevertheless, even that does not establish that the constitution so forbids, but only that the question has never arisen before. Petitioner Lowen has authority under the union constitution to construe it, but all the record contains is his affidavit, prepared solely for the purpose of this litigation, which states his view that the constitution forbids preconvention mailings but which, under these circumstances, is not entitled to deference. *See Alaniz v. OPM*, 728 F.2d 1460, 1465 (Fed. Cir. 1984). Thus, although the court of appeals assumed that there was a union "bylaw" forbidding preconvention mailings, JA 85, the absence of such a rule either in the text of the constitution or in an official interpretation makes it unnecessary for the Court to reach the question of whether a rule barring pre-convention mailings would be reasonable.

If the Court does reach that question, there is little question that



the rule is unreasonable.[11] Petitioners proceed under the assumption that the only consideration in determining whether a rule is reasonable is to decide whether it discriminates on its face between candidates. Pet. Br. 26-27. If that were so, however, the union's duty to comply with all reasonable requests to distribute campaign literature would provide little more assistance to would-be candidates than the rule against discrimination. Surely, the courts should also consider the effect of the rule on the candidates with the greatest need to exercise the right to have their literature distributed — candidates who are running against the incumbent officers.

Where the union's rule would, as here, invalidate most otherwise reasonable requests that a candidate running for office might make, the rule cannot be upheld. After all, the effect of petitioners' rule is to provide that a candidate for union office in a quadrennial election cannot begin to effectively reach the voters until a few days before the ballots are mailed. It is as if George Bush and Michael Dukakis, instead of being able to begin communicating their campaign positions to the voters in 1986, had had to wait until after the Republican and Democratic Conventions were held in the summer of 1988 (or, to make the analogy more precise, one would have assume that the conventions were not until October 1988), to begin their campaigns.

Under the union rule, mailings cannot even be done immediately after the convention ends. Thus, the IBA must wait until ten days after the convention to see whether all candidates will accept their

[11]We note that, unlike the references to the democratic traditions of the Steelworkers union that apparently influenced the Court in *Steelworkers v. Sadlowski*, 457 U.S. 102, 114 and n.7, 115 n.9 (1982), the IOMPP's record does not inspire similar confidence. To the contrary, the IOMMP is a union democracy scofflaw, in which judicial intervention has repeatedly been required to protect challengers against incumbents who abuse their control over union mailing lists and the election process generally. *E.g., Sheldon v. O'Callaghan*, 497 F.2d 1276 (2d Cir. 1974); *Usery v. IOMMP*, 422 F. Supp. 1221 (S.D.N.Y. 1976), *mod.*, 538 F.2d 946 (2d Cir. 1976); *Petrazullo v. Lowen*, 534 F. Supp. 173 (S.D.N.Y. 1982); *Hayes v. IOMMP*, 670 F. Supp. 1330 (D. Md. 1987). *See also* page 4, *supra*, describing ballot fraud in the most recent election.

nominations and have their eligibility certified. JA 60-61. At that point, the IBA selects a mailing agency, determines what the costs of mailings will be, prepares a letter notifying the candidates of these matters, and mails the letter to the candidates. Only then can the candidates begin to have their mailings processed.

In 1984, for example, the IBA's letter was dated August 15, JA 62, which was twenty days after the convention ended (July 27), and only twelve days before the ballots were mailed out (August 27). JA 57. And even after the mailing of the notification letter, it may take three days for the letter to reach the candidate; a day or so for the candidate to obtain a certified or cashier's check or money order and transmit it to the union in payment for the labels; a day or so for the union to place an order for printing of labels; another two or three days for the labels to be sent from Baltimore, where they are produced, to the mailing service which may be in another city (in 1984 it was in New York, JA 62); and an unspecified period of time for the mailing service to complete the mailing. Moreover, it is the notification letter that advises a candidate how many members there are in each of the union's membership groups and in the union overall, and so the candidate cannot place his printing order until that letter is received. Small wonder that, when pressed at oral argument in the district court, petitioners were only able to assure respondent that, if their rule were permitted to operate, his literature would be mailed "some period of time" before the ballots. JA 69. The few days thus allowed for doing union mailings is far less than was upheld as a reasonable restriction in *Carpenters*, and we think it clear that it is not a sufficient opportunity to campaign.[12]

[12]In *Marshall v. Meat Cutters Local 274*, 623 F.2d 1322 (9th Cir. 1980), not only did the rule require that mailing requests be made early in the election (at least fifty days before the balloting), rather than delaying the date when mailings could be done, but the Secretary did not challenge the reasonableness of the rule, only its application. *Id.* at 1325. Therefore, the decision there does not support the reasonableness of the IOMMP rule at issue here. In our view, however, there is some question whether it is reasonable to ***require*** a candidate to decide fifty days before the election whether he will need, and be able to afford, to do a mailing to the entire membership.



Petitioners have tried to save their rule by pointing out that the ballots need not be returned until ninety days after they are first mailed. However, the record shows that many members return their ballots almost immediately after they receive them, JA 14, 50, and the experience in other unions is similar. *E.g.*, *Bauman v. Presser*, 117 LRRM 2393, 2397 (D.D.C. 1984), *app. dism.*, 119 LRRM 2247 (D.C. Cir. 1985). It is for that reason that the courts have held that the relevant period, in determining whether there has been a sufficient time allowed for campaigning in an election or a referendum that is conducted by mail, is not the time between the beginning of the campaign and the counting of the ballots, but the time between the beginning of the campaign and the mailing of the ballots. *Bauman*, *supra*, 117 LRRM at 2400; *Marshall v. Teamsters Local 468*, 643 F.2d 575, 577 (9th Cir. 1980).[13]

Moreover, the union's procedures flatly contradict both the Secretary's regulations and the case law. Those regulations provide, and the case law is clear, that a candidate has the right to do a mailing to the membership during the period leading up to nominations (here, at the Convention), as well as after the nominations have been made. 29 C.F.R. § 452.80; *Brock v. Hotel Employees Local 471*, 706 F. Supp. 175, 182 (N.D.N.Y. 1989); *Camarata v. Teamsters*, 478 F. Supp. 321, 330 (D.D.C. 1979), *aff'd mem.*, 108 LRRM 2924 (D.C. Cir. 1981); *Morrissey v. Curran*, 356 F. Supp.

[13]The evidence supporting the proposition that most members vote as soon as they receive their ballots is not contradicted by petitoners' proffer of evidence "that members vote throughout the ninety day period." JA 68. After all, the work patterns of the members of the IOMMP often preclude them from returning home to pick up their mail for lengthy periods of time, and it is those workers who are away from home during the first weeks of balloting who are likely to vote late. Petitioners did not offer any proof about when the majority of the ballots are received, but in a close election such as the 1988 election which was decided by 110 votes out of 4500 votes cast, an insurgent needs to be sure that his messages are timely received by every voter. Moreover, as respondent argued below and the district court found, an early mailing was needed to ensure that members would receive his campaign messages in time to be able to discuss them with each other before they voted. JA 14, 78.

312, 314-315 (S.D.N.Y. 1973); *Yablonski v. UMW*, 71 LRRM 2606, 2606 (D.D.C. 1969). Indeed, the statutory provision allowing all "bona fide candidates" to do campaign mailings would be a nullity if rules allowing only nominated candidates to do mailings were reasonable, *Cotter v. Helmer*, 692 F. Supp. 313, 317 (S.D.N.Y. 1988), which is one effect of the rule at issue here.[14]

Nor can the union avoid its responsibilities under the Act because it makes arrangements with an independent agency to handle its balloting only after the convention has ended. Although a union may retain such an independent agency, the LMRDA places the obligation to do the mailing for union candidates on the *union*, not on its agent. *Wirtz v. AGVA*, 267 F. Supp. 527, 540-541 (S.D.N.Y. 1967); *Marshall v. Watchman's Local 2*, 100 LRRM 2744, 2747 (D.D.C. 1979). Indeed, the Secretary's regulations compel unions to hire extra staff if needed to ensure that all reasonable mailing requests can be honored. 29 C.F.R. § 452.69. Accordingly, petitioners' plea that its leadership is too busy to think about campaign mailings before the convention, Pet. Br. 24, is not a legitimate objection, and the union's delay in selecting an agency cannot be used as an excuse under section 401(c).

Finally, both the statute, which requires compliance with "*all* reasonable requests of any candidate," (emphasis added), and the case law, make it clear that union candidates may do more than one mailing. *Marshall v. Plumbers Local 654*, 99 LRRM 2943, 2944 (N.D. Tex. 1978). By effectively barring any mailings until a few days before the ballots are sent out, petitioners' rule effectively

[14]The fact that one reason for allowing mailings before nominations is to permit a candidate to secure sufficient support to obtain nomination, which does not apply to the IOMMP because respondent was a delegate and could nominate himself, does not detract from the other reasons why respondent wanted to be able to conduct a pre-nominations mailing — to head off other possible insurgent nominations and to encourage discussions between union members and the union opinion leaders before the latter came to attend the union convention.



precludes candidates from taking advantage of that right.[15] Surely, whatever else may be required before a union rule is found to be "reasonable," the rule must at least be consistent with applicable regulations and cases. Because the IOMMP rule fails this test also, it cannot be upheld.

Another way to approach the question of the reasonableness of petitioners' rule is to consider precisely what union interests it advances, what obstacles it places in the way of union democracy, and whether the union has other ways in which the same interests could be protected. This approach would be consistent with the Court's cases under section 401(e) of the Act, which authorizes unions to adopt "reasonable qualifications" to run for union office. This Court has held that Congress did not intend to give this exception a broad reach, and that only those qualifications that are truly necessary to advance important union interests can be upheld. *Steelworkers Local 3489 v. Usery*, 429 U.S. 305, 309-313 (1977); *Wirtz v. Hotel Employees Local 6*, 391 U.S. 492, 499 (1968). If the Court does decide to adopt a "reasonable rules" approach in this case, it should adopt a similarly strict standard to decide whether mailing rules are valid.

Under that standard, the ban on preconvention mailings certainly cannot be upheld. Petitioners have articulated only four interests in support of their rule.[16] The first two are union self-government, Pet. Br. 15, and the interest in avoiding discrimination by providing

[15]A candidate may also seek to save campaign funds by using a bulk mail permit, pursuant to which the literature may not be delivered to the members for several days after the material is delivered to the post office. Levy, *Electing Union Officers Under the LMRDA*, 5 Cardozo L. Rev. 737, 777-778 n.224 (1985). *See also Mims v. Teamsters Local 728*, 821 F.2d 1568 (11th Cir. 1987) (although not mentioned in opinion, that was reason for dispute over union delay in mailing). A candidate could certainly not take advantage of this right if the union can delay the mailing until a few days before the ballots themselves are mailed.

[16]*Amicus* AFL-CIO, by contrast, does not argue that petitioners have a reasonable rule; rather, it simply assumes such reasonableness *arguendo*. Br. at 5-6 n.4.

notice to all candidates in advance of the election of what mailings will be allowed. Pet. Br. 21. However, these interests prove too much because they are merely pleas for *any* rule, and thus could be used to support even the most restrictive and oppressive of rules, however unreasonable they might otherwise be.

Petitioners also suggest that the rule ensures that elections are handled by an independent committee composed of rank-and-file members, not by the incumbents themselves, thus providing an assurance of neutrality. Pet. Br. 23. However, IOMMP conventions are held every two years, JA 17, and if the union insists on using the IBA and IBC to handle all mailings, but is unwilling to rely upon the IBC and IBA elected during the 1984 convention to handle mailings before the 1988 convention, it could easily select a new IBA and IBC at the intervening convention in 1986 to handle requests that are made during the next two years. Moreover, if an insurgent candidate wants to have campaign mailings done before the convention badly enough to run the risk that the incumbents will manage his mailing less favorably than a supposedly independent body would do, it is hard to understand why the candidate should not be allowed to take that risk.[17]

The final interest asserted by petitioners is in avoiding mailings by persons who are not eligible to run for union office. Pet. Br. 24. It is hard to see how this interest helps petitioners here, inasmuch as they conceded in the lower courts that respondent was

[17]Nor is there any reason to believe that the IBC is any more neutral than the incumbents would be, because its members are selected by whoever controls the most votes at the convention. Indeed, the delegates to an IOMMP convention in the year of nominations for IOMMP office are not elected as delegates in the few months preceding the convention, as is done in most unions and in the Republican and Democratic parties. Instead, convention delegates are elected during the same four-year cycle as the union's officers. Thus, for example, the IBC and IBA selected at the 1988 convention, to supervise the election in which a set of candidates were to run against the incumbents who had won in 1984, were picked by delegates who had been elected during the elections following the 1984 convention along with the very same incumbent officers.



eligible to run for office. In any event, if a union could show that it had a valid eligibility rule and that it could be sure that a would-be candidate would not qualify to run for office, that would be a valid defense to a section 401(c) claim. For example, if a candidate had either joined the union or started working at the craft at a time less than twenty-four months before the election, the union could be sure that the member would not meet a continuous good standing rule that would be deemed valid under the Secretary's regulations. 29 C.F.R. §§ 452.37, 452.41.

On the other hand, a rule that bars campaign mailings until just before the ballots are mailed obviously makes it very difficult for a non-incumbent to run for union office, especially in a national maritime union such as the IOMMP where the membership is widely dispersed. The problem is compounded in the IOMMP where, according to the undisputed evidence, "the union's newspaper is the principal and only regular source of news which members have about union affairs," the leadership controls the newspaper and screens out any membership contributions which are deemed "political," and the leadership uses its control of the paper to include a "steady barrage of information favoring the policies espoused by the incumbents" and "to promote their own views of the problems facing the union." JA 13-14.

Petitioners assert that they were entitled to a trial in order to put on evidence supporting the reasonableness of their rule. Pet. Br. 26 and n.9, 28. However, the facts on which respondent has relied, both in this Court and below, to establish the unreasonableness of the union's rule are essentially undisputed, and petitioners argued to the district court that the case should be decided on affidavits unless there were "factual conflicts." JA 65. Moreover, even when petitioners began to make proffers about possible testimony once the argument in the district court seemed to turn against them, none of the proffers contradicted respondent's evidence about the incumbents' use of the channels of communication within the union, about voters tending to cast their ballots immediately upon receipt, or about the need for pre-convention mail-

ings. Even assuming the truth of petitioners' proffers, there is no basis for remanding this case for a trial concerning the reasonableness of the union's rule.[18]

Thus, the IOMMP rule, if it is a rule, is an unreasonable one because it violates the LMRDA, it severely undermines insurgents' opportunities to mount an effective challenge to incumbents, and it is not needed to advance any legitimate union objective. Accordingly, the rule cannot be upheld.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Paul Alan Levy
(*Counsel of Record*)
Alan B. Morrison
Michael E. Tankersley

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Respondent

September 26, 1990

[18]All of the proffers are set forth at JA 66-69, 72.